91-90

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RONALD MEYER
LEON MILLER a/k/a LEE MILLER,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Government's indictment is an Ex Post Facto Law which is Prohibited under the Constitution, Article I, 9 Subdivision (3) and 10.

II. Whether prior to the 1987 Amendment of the Currency Transaction Reporting Act and attendant regulations, the Petitioners were given fair notice that structuring cash transactions so as to avoid the reporting requirements was criminal; Notice being required under the due process clause.

III. Whether the appeals court erred in not affirming the district court's dismissal of part of the indictment under the Bank Secrecy Act of 1970 ("The Act") and its implementing regulations, 31 U.S.C. § 5313(a) and 31 C.F.R. Part 103, 31 U.S.C. § 5322 and 18 U.S.C. § 2 and § 1001, since the appeals court ruling on the issues conflict with other Federal Appeals Courts' decisions on the same issue as to the structuring of Multiple currency transactions under the 1984 regulations and the 1987 regulations.

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Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Ronald Meyer and Leon Miller, a/k/a Lee Miller, respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit filed in this case on May 13, 1991.

REFERENCES TO THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears in the appendix to this Petition at Page A-1. The opinion of the *United States v. Mastronardo*, 849 F.2d 799 (3d Cir. 1988) appears at Page A-21. United States District

Court order dismissing the indictment in part entered 6-27-90 appears at Page A-13.

STATEMENT OF JURISDICTIONAL GROUNDS

The Judgment of the United States Court of Appeals for the Eighth Circuit was filed on May 13, 1991. A Stay of Mandate was granted by the district court pending the filing of a Writ of Certiorari with the Supreme Court. This Petition for Writ of Certiorari was filed within ninety days of the Judgment. This Court's jurisdiction is involved under U.S. Sup. Ct. Rule 10.1 (A) and Rule 10.1 (C), 28 U.S.C.A.

STATUTORY PROVISIONS INVOLVED IN THIS CASE

1. Bank Secrecy Act 1970 (the "Act").

2. 31 U.S.C. §§ 5313(a), 5322.

3. 31 C.F.R. Part 103.

18 U.S.C. § 2.

18 U.S.C. § 1001.

18 U.S.C. § 371.

STATEMENT OF THE CASE

The indictment alleges that in 1984 defendants Thomas A. Williams, Ronald Meyer, and Ronald Whitaker each purchased money orders totaling more than $10,000 from three branches of defendant Farm & Home Savings Association in Dallas on September 26, 1984; and that Meyer and defendant Leon Miller each purchased money orders totaling more than $10,000 from three St. Louis branches of Farm & Home Savings on November 28, 1984. The Dallas purchases were made with the "knowledge,

acquiescence and consent" of defendant Fred Wilmot, then a Senior Vice President of Farm & Home in Dallas, and the St. Louis purchases were made with the "knowledge, acquiescence and consent" of James Besher, then a Senior Vice President of Farm & Home in St. Louis, who was not named as a defendant. Pursuant to an alleged conspiracy among all the defendants, Farm & Home did not file Currency Transaction Reports ("CTRs") with respect to any of these purchases, as allegedly required by The Act.

After defendants Farm & Home and Whitaker pleaded guilty to certain of the charges and the district court dismissed Count II of the indictment, relating to the Dallas purchases, for lack of venue, the remaining defendants—bank customers Williams, Meyer and Miller and bank officer Wilmot—moved to dismiss Counts I, III and IV.[1] Count I charges these defendants, with conspiracy to violate the Act in violation of 18 U.S.C. § 371. Count III charges appellees with knowingly and willfully causing Farm & Home to fail to file CTRs in connection with the St. Louis money order purchases, in violation of 31 U.S.C. §§ 5312 and 5322 and 18 U.S.C. § 2. Count IV charges appellees with knowingly and willfully concealing the material facts that would have been disclosed to the Internal Revenue Service had CTRs been filed in connection with the St. Louis purchases, in violation of 18 U.S.C. §§ 1001 and 2.

The district court dismissed all charges against appellee Wilmot, the Texas bank officer, because the indictment failed to allege that he had engaged in the deliberate structuring of the St. Louis transactions to avoid the CTR reporting requirement. The

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[1] Count V of the indictment charged Wilmot with giving false testimony before a St. Louis grand jury investigating possible violations of the Act by Farm & Home and its officers. Count V was not dismissed but is not otherwise relevant to this appeal.

district court also dismissed the charge that appellees Meyer, Williams and Miller violated § 1001 on the ground that these bank customers had not duty to disclose their structured transactions to Farm & Home under this court's decision in *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986). However, the district court held that the indictment properly charges the customer appellees with aiding and abetting, and conspiring to aid and abet, the nonfiling of CTRs in violation of the Act because it alleged that Farm & Home was aware of their structuring of the St. Louis purchases. The United States Court of Appeals reversed the district court's dismissal of Counts I, III, IV, and stayed the Mandate pending the filing of a Writ of Certiorari with the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

A. This Case Presents an Important Issue Relating to the Ex Post Facto Laws and Fair Notice to the Petitioners that Any Cash Structuring Would B e Criminal Under 31 U.S.C. §§ 5313, 5322, and 18 U.S.C. §§ 2 and 1001 since the 1984 regulation did not address multiple currency transactions.

At the time of the indictment in 1984, the current reporting regulations promulgated pursuant to the authority established in 31 U.S.C. § 5313 provided as follows:

Each financial institution shall file a report on each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than $10,000. Such reports shall be made in forms prescribed by the Secretary and all information for the form shall be furnished.

In 1987, the regulation was changed as follows:

Multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling more than $10,000 during any business day.

The Reporting Act of 1987 was not implemented at the time of this indictment, therefore the indictment charges a crime for offenses committed when the 1987 Act was not in effect. Therefore in violation of the Ex Post Facto Laws, Art. II, 9 subdivision (3) and 10, United States Constitution. The indictment, in order to be valid, must allege that the acts of the petitioners, if prove, constitution a violation of the laws of the United States, *United States v. Polychron*, 841 F.2d 833, 834 (8th Cir. 1981) (emphasis added). Also, under the state of the law in 1984, prior to the 1987 amendment, the law gave no notice that

a criminal act was being committed or even a criminal conspiracy (*United States v. Mastronardo*, 849 F.2d 799 (3d Cir. 1988).

B. The Case Presents an Issue That This Court Needs to Address Since There Are Conflicting Opinions Concerning this Same Matter of Law between the Federal Appeal Circuit Courts.

The Eighth Circuit has maintained the case of *United States v. Polychron*, 841 F.2d 833 (8th Cir.), *cert. denied*, 488 U.S. 85 (1988) and *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986) is the reasoning behind its opinion. However, the court states in its opinion that other circuits have held to the contrary.

Polychron states "If the Acts alleged in the indictment do not constitute a violation of the law, the indictment is properly dismissed." Remembering this indictment is under the 1984 reporting regulations and before the 1987 regulations change, the Federal Appeals Court in the Third Circuit wrote in *United States v. Mastronardo*, 849 F.2d 799 (3d Cir. 1988), that prior to 1986 amendment, The Currency Transaction Reporting Act and Attendant Regulations did not give reasonable bank customers fair notice that structuring cash transactions was criminal therefore a person could not be convicted of *any* crime based on that activity. *Polychron, supra*, and this appeals court judgment states "It is a crime under the 1984 regulations, *Mastronardo, supra*, states it is not a crime because of lack of fair notice that a crime was committed.

CONCLUSION

For these reasons, a writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2223

United States of America,
Appellant,

v.

Farm & Home Savings
Association, Thomas A.
Williams, Ronald Meyer,
Appellees,

Ronald Whitaker, Fred Wilmot
and Leon Miller a/k/a Lee Miller,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: January 7, 1991
Filed: May 13, 1991

Before LAY, Chief Judge, MAGILL and LOKEN,
Circuit Judges.

LOKEN, Circuit Judge.

The United States appeals form the district court's dismissal of most of counts I, III, and IV of a multi-count indictment charging appellees and others with violations of the reporting

requirements of the Bank Secrecy Act of 1970 (the "Act") and its implementing regulations, 31 U.S.C. § 5313(a) and 31 C.F.R. Part 103. In dismissing these portions of the indictment, the district court distinguished our prior decision in *United States v. Polychron*, 841 F.2d 833 (8th Cir.), *cert. denied*, 488 U.S. 851 (1988). We conclude that the conduct charged in the indictment, if proved, would violate the Act as construed in *Polychron*. Accordingly, we reverse.

The indictment alleges that in 1984 defendants Thomas A. Williams, Ronald Meyer, and Ronald Whitaker each purchased money orders totaling more than $10,000 from three branches of defendant Farm & Home Savings Association in Dallas on September 26, 1984; and that Meyer and defendant Leon Miller each purchased money orders totaling more than $10,000 from three St. Louis branches of Farm & Home on November 28, 1984. The Dallas purchases were made with the "knowledge, acquiescence and consent" of defendant Fred Wilmot, then a Senior Vice President of Farm & Home in Dallas, and the St. Louis purchases were made with the "knowledge, acquiescence and counsel" of James Besher, then a Senior Vice President of Farm & Home in St. Louis, who was not named as a defendant. Pursuant to an alleged conspiracy among all the defendants, Farm & Home did not file Currency Transaction Reports ("CTRs") with respect to any of these purchases, as allegedly required by the Act.

After defendants Farm & Home and Whitaker pleaded guilty to certain of the charges and the district court dismissed Count II of the indictment, relating to the Dallas purchases, for lack of venue, the remaining defendants — bank customers Williams, Meyer and Miller and bank officer Wilmot — moved to dismiss Counts I, III and IV.[1] Count I charges these defendants , the

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[1] Count V of the indictment charged Wilmot with giving false testimony before a St. Louis grand jury investigating possible violations of the Act by

(Footnote 1 continued on next page)

appellees before this court, with conspiracy to violate the Act in violation of 18 U.S.C. § 371. Count III charges appellees with knowingly and willfully causing Farm & Home to fail to file CTRs in connection with the St. Louis money order purchases, in violation of 31 U.S.C. §§ 5313 & 5322 and 18 U.S.C. § 2. Count IV charges appellees with knowingly and willfully concealing the material facts that would have been disclosed to the Internal Revenue Service had CTRs been filed in connection with the St. Louis purchases, in violation of 18 U.S.C. § 1001 & 2.

The district court dismissed all charges against appellee Wilmot, the Texas bank officer, because the indictment failed to allege that he had engaged in the deliberate structuring of the St. Louis transactions to avoid the CTR reporting requirement. The district court also dismissed the charge that appellees Meyer, Williams and Miller violated § 1001 on the ground that these bank customers had no duty to disclose their structured transactions to Farm & Home under this court's decision in *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986). However, the district court held that the indictment properly charges the customer appellees with aiding and abetting, and conspiring to aid and abet, the nonfiling of CTRs in violation of the Act because it is alleged that Farm & Home was aware of their structuring of the St. Louis purchases.

I.

A fundamental threshold issue in this case is whether, under the Act and regulations in effect in 1984, the facts alleged in the indictment imposed a duty on Farm & Home to file one or more CTRs reflecting the St. Louis money order purchases. The

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(Footnote 1 continued)

Farm & Home and its officers. Count V was not dismissed but is not otherwise relevant to this appeal.

indictment alleges that the customer defendants purchased multiple money orders totaling more than $10,000, but less than $10,000 each, from three branches of Farm & Home on the day in question. In 1984, the regulations[2] required Farm & Home to file a CTR in connection with "each . . . transfer . . . which involves a transaction in currency of more than $10,000," 31 C.F.R. § 103.22(a). The instructions to Treasury Department Form 4789, the CTR report, advised financial institutions that, "Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them." However, the statute and regulations were not amended to expressly cover such "multiple transactions" until after the 1984 events here in question occurred.

Therefore, appellees argue, Farm & Home had no duty to file CTRs in connection with the St. Louis purchases and appellees cannot be charged with *any* crimes in connection with those purchases under this court's decision in *Larson*.

In *Larson*, we held that a bank customer who purchased ten cashier's checks at four bank branches on the same day, for the purposes of avoiding the filing of CTRs, was not liable for concealing material facts from the government in violation of 18 U.S.C. § 1001, or of aiding and abetting a violation of the Act in violation of 18 U.S.C. § 2, because the banks were unaware of the structured transactions and thus had no duty to file CTRs. 796

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[2]The Act requires a domestic financial institution, such as Farm & Home, to "file a report . . . at the time and in the way the Secretary [of the Treasury] prescribes" in connection with each currency transaction "in an amount . . . or under the circumstances the Secretary prescribes by regulation," § 5313(a). Willful failure to file is punishable under § 5322(a) and (b). Thus, the Secretary's regulations define the scope of the bank's reporting duties under the Act. See generally *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 37-41, 57-59 (1974), which upheld the constitutionality of the Act.

F.2d at 247. Although other circuits have held to the contrary, *see, e.g., United States v. Cure*, 804 F.2d 625, 629 (11th Cir. 1986), we have consistently adhered to our decision in *Larson.*

Subsequent to *Larson*, we considered whether the Act's reporting requirements in effect in 1984 would be violated if a bank officer affirmatively structured a currency transaction, either on his own behalf or on behalf of a bank customer, in order to avoid causing the bank to file a CTR. In *United States v. Polychron, supra*, we held that a bank officer who "structures an otherwise reportable transaction into multiple transactions in a single day that do not individually exceed $10,000" may be criminally liable for causing the bank to fail to file a CTR. 841 F.2d at 837. In *Pilla v. United States*, 861 F.2d 1078 (8th Cir. 1988), we upheld the conviction of a bank advisory board member who, with the assistance of a bank officer, structured cash transactions in excess of $10,000 with the bank on behalf of a purported drug dealer, without the filing of CTRs. Following *Polychron*, we held that Pilla's relationship with the bank gave him a duty to report the transactions; moreover, unlike the bank in *Larson*, the bank was aware of the duty to report because a bank officer was Pilla's co-conspirator. *Id.* at 1081.

In this case, the indictment alleges that appellees Meyer and Miller agreed with Besher, the Farm & Home officer in St. Louis, to cause Farm & Home to failed to file CTRs, and that Miller and Meyer purchased money orders in amounts in excess of $10,000 per person per day without the filing of CTRs "with the knowledge, acquiescence and counsel" of Besher. The district court held that the bank had no duty under *Polychron* to file CTRs in this situation because the bank customers, Miller and Meyer, rather than the bank officer, Besher, actually "structured" the transaction. We disagree. Where the indictment alleges this level of knowledge and participation by a responsible bank employee, we think it immaterial to the bank's duty to report that the money order purchases were physically handled by the

customers at various bank branches. These allegations if proved[3] would establish that the bank knew that one or more transactions in excess of $10,000 per day were being structured in an attempt to evade Farm & Home's reporting requirements under the Act. This is sufficient to impose a duty on the bank to file CTRs under *Polychron*, which in this regard is consistent with the cases from nearly every circuit that has considered the question. *See United States v. Bank of New England*, 821 F.2d 844, 850-51 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987); *United States v. Heyman*, 794 F.2d 788, 792 (2d Cir.), *cert. denied*, 479 U.S. 989 (1986); *United States v. American Investors*, 879 F.2d 1087, 1098-1099 (3d Cir.), *cert. denied*, 110 S. Ct. 368 (1989); *United States v. Thompson*, 603 F.2d 1200, 1203-04 (5th Cir. 1979); *United States v. Hayes*, 827 F.2d 469, 472 (9th Cir. 1987); *United States v. Cook*, 745 F.2d 1311, 1315-16 (10th Cir. 1984), *cert. denied*, 469 U.S. 1220 (1985); *United States v. Cure*, 804 F.2d 625, 6237-28 (11th Cir. 1986). *Contra, United States v. Risk*, 672 F. Supp. 346, 357-58 (S.D. Ind. 1987), *aff'd*, 843 F.2d 1059, 1061-62 (7th Cir. 1988). Appellees' principal argument on appeal is, in effect, that we should reject this nearly uniform line of authority and overrule *Polychron*. We decline to do so.

II.

With this threshold issue resolved, we now turn to the specific crimes charges in Counts I, III and IV of the indictment.

Count I — The Conspiracy

Count I alleges that appellees and their co-defendants willfully and knowingly conspired (i) to defraud the United States by

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[3] In reviewing the sufficiency of an indictment, we accept the government's allegations as true, without reference to allegations outside the indicting document. *Boyce Motor Lines v. United States*, 342 U.S. 337, 343 & n.16 (1952); *United States v. Von Barta*, 635 F.2d 999, 1002 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981).

obstructing the governmental function of collecting data through CTRs; (ii) to cause Farm & Home to fail to file CTRs; and (iii) to conceal material facts in a matter within the jurisdiction of the Treasury Department. To state a conspiracy violation under 18 U.S.C. § 371, the government must alleged "(1) an agreement to commit an illegal act; (2) an unlawful objective; and (3) an act done in furtherance of the conspiracy committed by at least one of the participants." *United States v. Cerone*, 830 F.2d 938, 944 (8th Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988).

The district court correctly held that the Count I charges are sufficient as to appellees Meyer, Williams and Miller. The alleged participation of bank officer Besher in the scheme, if proved, would establish that Farm & Home had a duty under *Polychron* to file CTRs in connection with the St. Louis money order purchases. In *Polychron*, the dismissal of a conspiracy count against the participating bank officer was reversed. Likewise, here, the motion to dismiss the conspiracy charges against these bank customers was properly denied. *See also United States v. American Investors, supra*, 879 F.2d at 1100-1103; *United States v. Sans*, 731 F.2d 1521, 1530-1532 (11th Cir. 1984), *cert. denied*, 469 U.S. 1111 (1985).

The district court dismissed Count I as to appellee Wilmot on the ground that the specific acts alleged "even if proved, do not sufficiently allege a substantive crime against the United States." We believe that this reflects too narrow a view of the alleged conspiracy.

With respect to Wilmot, the indictment alleges that defendants caused Farm & Home not to file CTRs in connection with the Dallas money order purchases "with the knowledge, acquiescence and consent and at the direction of" Wilmot (Count II);[4]

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[4] Under *Polychron*, because of Wilmot's alleged participation, Count II properly alleged violations of the Act in connection with the Dallas purchases

(Footnote 4 continued next page)

that Wilmot and BEsher had a telephone conversation before the St. Louis purchases (an alleged overt act); and that defendant then caused Farm & Home not to file CTRs in connection with the St. Louis purchases "with the knowledge, acquiescence and counsel of" Besher (Count IV). While only one of the 34 overt acts alleged in Count I relates specifically to Wilmot, that one, his telephone conversation with Besher, forges a potentially significant link between what might otherwise be separate Dallas and St. Louis conspiracies. Moreover, Count I charges all defendants, including Wilmot, with willful and knowing conspiracy to commit the violations alleged. Under these circumstances, Count I was sufficient as to Wilmot. As we said in *United States v. Thomas*, 759 F.2d 659 (8th Cir. 1985):

> The essence of a conspiracy is the agreement, and once a defendant's participation has been established he is culpable for everything said or done by any of the other conspirators in furtherance of the conspiracy.

Id. at 668.

Count III — The Substantive Violations of the Act

Meyer, Williams and Miller. Count III alleges that the customer appellees violated 31 U.S.C. §§ 5313 and 5322 and 18 U.S.C. § 2 by causing Farm & Home to fail to file CTRs for money order purchases in excess of $10,000 per person per day at three Farm & Home branches in St. Louis. The district court held that the indictment sufficiently alleges that these appellees violated 18 U.S.C. § 2 by aiding and abetting in the non-filing of CTRs, in violation of 31 U.S.C. § 5313, because Farm & Home was aware of the wrongful structuring of the transaction by reason of the "knowledge, acquiescence and counsel" of Besher.

(Footnote 4 continued)

if venue was proper; the government has not appealed the district court's dismissal of Count II for lack of venue.

As the above discussion makes clear, this was a correct application of *Polychron*.

Wilmot. The district court dismissed Count III as to Wilmot because, unlike the bank officer in *Polychron*, the indictment does not charge *him* with "intentionally structuring transactions in order to avoid the statutory filing requirements," and because the specific facts alleged as to Wilmot "do not sufficiently allege a crime against the United States." We disagree. As discussed above, it was the alleged participation of Besher, not Wilmot, that imposed a duty on Farm & Home to file CTRs in connection with the St. Louis transactions. Count III alleges that Wilmot knowingly and willfully aided and abetted this St. Louis reporting violation. Though Wilmot could not be charged with the substantive offense of failing to file CTRs in connection with the St. Louis transactions, because he had no duty as a Dallas officer of Farm & Home to do so, he may be charged with aiding and abetting such an offense if he "in some way associated himself with the criminal venture as something he wished to bring about and . . . sought by his actions to make it succeed." *United States v. American Investors, supra*, 879 F.2d at 1103. Thus, Count III sufficiently alleges a violation of 18 U.S.C. § 2 by Wilmot.

Count IV — The § 1001 Violation

Count IV alleges that appellees violated 18 U.S.C. 1001 and 2 by concealing from the government, "by scheme and device," the facts that would have been disclosed had CTRs been filed in connection with the St. Louis purchases. The district court dismissed this Count as to the customer defendants based upon the holding in *Larson* that bank customers have no duty to disclose their conduct to banks, and as to Wilmot because this Court "does not sufficiently allege a crime against the United States."

We agree that, under *Larson*, the alleged § 1001 violations were properly dismissed as to these defendants because they had

no duty to disclose information to the government by filing CTRs. However, Count IV also accuses them of aiding and abetting a § 1001 violation by Farm & Home, in violation of § 2. In *Larson*, the § 2 conviction was reversed because "the banks were unaware that Larson was structuring his transactions," 796 F.2d at 247. Here, on the other hand, Count IV alleges that bank officer Besher participated in the "scheme and device" to cause Farm & Home to conceal information from the government by failing to file CTRs. Thus, as to the § 2 charge in Count IV, like the § 2 charge in Count III, this case is distinguishable from *Larson*.

It is now settled that the charge of failing to file a CTR in violation of 31 U.S.C. § 5313, and the charge of concealing the facts called for on the report in violation of 18 U.S.C. § 1001, are distinct crimes having distinct elements of proof that may be separately punished. *See United States v. Woodward*, 469 U.S. 105, 108-09 (per curiam). As additional question, however, is whether this indictment adequately charges the bank defendants with knowingly and willfully concealing or covering up a material fact "by any trick, scheme, or device" in violation of 18 U.S.C. § 1001.

We do not examine this issue in a vacuum. In *United States v. Shannon*, 836 F.2d 1125 (8th Cir.), *cert. denied*, 486 U.S. 1058 (1988), defendant was a bank chairman who obtained a large cash loan, deposited the cash in the bank's correspondent account at another bank, and then transferred the money from that account to his personal use, all without the filing of any CTRs. Distinguishing *Larson*, this court affirmed Shannon's conviction for failing to cause the filing of CTRs, based upon his position of control at the first bank. However, we affirmed the dismissal of a charge that he also violated § 1001 by concealing facts from the second band which caused it to fail to file a CTR:

> To establish a concealment violation of section 1001, the government must prove more than just a passive failure on the part of the defendant to reveal a material fact. Rather, the government must prove an affirmative act by which a material fact is actively concealed. Here . . . there was no evidence that the defendant took affirmative steps to conceal these facts from [the second bank].

836 F.2d at 1129-1130 (citations omitted).

In this case, the indictment alleges that the customer appellees, who were in the same relationship to Farm & Home as defendant was to the second bank in *Shannon*, adopted an elaborate plan involving numerous individuals, *including Besher, a senior officer of Farm & Home*, to ensure that facts were not disclosed to the government through the filing of CTRs by Farm & Home. Whether this plan as implemented constituted the affirmative steps necessary under *Shannon* to violate 18 U.S.C. § 1001 may well be a close question. But we think it is properly a question for the jury. The indictment, as it must, pleads the necessary elements of the § 1001 offense by Farm & Home and Besher, and fairly informs the customer defendants of the aiding and abetting charges they must defend. *See Hamling v. United States*, 418 U.S. 87, 117 (1974). Under these circumstances, the § 2 violations alleged in Count IV of the indictment should not be dismissed as to the customers because it fails further to define the "scheme and device" alleged; it is for the jury and the trial court to determine whether appellees' conduct fell within the statutory proscription. *See United States v. London*, 550 F.2d 206, 213 (5th Cir. 1977). For the same reasons, we conclude that Count IV sufficiently charges Wilmot with violating 18 U.S.C. § 2 by knowingly and willfully participating in the scheme and device to conceal.

Accordingly, the order of the district court dismissing portions of Counts I, III and IV of the indictment is reversed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 89-198 CR(3)

UNITED STATES OF AMERICA,
Plaintiff,

v.

FARM AND HOME SAVINGS ASSOC., et al.,
Defendants.

(Filed: June 27, 1990)

ORDER

This matter is before the Court on motions to dismiss Counts I, III, and IV of the superseding indictment, filed by defendants Wilmot, Williams, Meyer and Miller, on the grounds that defendants were not under any duty to file currency transaction reports with respect to the transactions alleged in the superseding indictment.[1] For the reasons set forth below defendants' motions will be granted in part and denied in part.

Pursuant to 28 U.S.C. § 636(b), the pretrial matters were refereed to United States Magistrate William S. Bahn for review and recommendation. Magistrate Bahn held a hearing on the motions to dismiss and recommended denial. Defendants objected and requested a de novo hearing thereon. On May 31, 1990, the Court took evidence and heard oral argument on the

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[1] Count II was dismissed by this Court on May 24, 1990, for improper venue. Count V charges defendant Wilmot with perjury in connection with the investigation of these charges, and is not the subject of the motions presently before the Court.

motions. Based on the arguments of counsel and materials submitted at the hearing, the Court makes the following findings, for the purpose of these motions only.

The superseding indictment alleges the following: In 1984, defendants Meyer and Williams, and an IRS special undercover agent met with defendant Wilmot, senior vice president of the Farm & Home Savings and Loan branch in the Dallas, Texas metropolitan area. After leaving Wilmot's office, Meyer and Williams purchased a total of $120,000 in money orders at three separate Farm & Home branches in the Dallas, Texas area. No CTRs were filed on these transactions.

Thereafter, defendant Wilmot telephoned James Besher, the senior vice president of Farm & Home, responsible for the Farm & Home branches in the St. Louis, Missouri metropolitan area. Defendants Meyer and Miller then had a conversation with Besher, after which Meyer and Miller purchased several money order each under $10,000, but all totalling more than $10,000. No CTRs were filed on these transactions.

The superseding indictment charges defendants with failing to file currency transaction reports or causing them not to be filed (31 U.S.C. §§ 5313 and 5322 and 18 U.S.C. § 2) and with wilfully concealing a material fact from the Department of Treasury in regard to the St. Louis transactions (18 U.S.C. § 1001) (Count IV); and with conspiring to violate the currency transaction reporting statute and regulations which require the filing of such reports in connection with the transactions in St. Louis, and Dallas (18 U.S.C. § 371) (Count I and III).

At the time of the events alleged in the indictment, the currency reporting regulations promulgated pursuant to the authority established in 31 U.S.C. § 5313 provided as follows:

> Each financial institution shall file a report on each deposit, withdrawal, exchange of currency or other payment or

> transfer, by, through, or to such financial institution, which involves *a transaction in currency of more than $10,000*. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

31 C.F.R. § 103.22(a) (emphasis added).

In 1987, the regulation was changed as follows:

> Multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling more then $10,000 during any business day.

Defendants argue that because the Reporting Act and implementing regulations, in effect in 1984, spoke only in terms of "a transaction" of more than $10,000, CTRs were not required to be filed in a situation where an individual purchased in excess of $10,000 in separate money orders from a financial institution in one day, and the bank was not required to aggregate the individual transactions in arriving at the reporting figure of more than $10,000. Defendant Wilmot further argues that the allegations in the superseding indictment pertaining to him do not allege a crime against the United States.[2]

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[2] Defendant Wilmot also argues that his statements to defendants Meyer and Williams (which were electronically recorded and a transcript of which was introduced into evidence at the hearing) of his understanding of the requirements of the federal banking regulations with respect to the filing of currency transactions was accurate, and cannot be considered criminal activity. In deciding a motion to dismiss an indictment, the Court is restricted to the allegations contained in the indictment. Accordingly, the Court makes no determination as to whether these conversations constitute criminal activity.

In order to be valid, an indictment must allege that the defendants performed acts which if proven, constitute violations of the laws as charged. "If the acts *alleged in the indictment* do not constitute a violation of law, the indictment is properly dismissed." *United States v. Polychron,* 841 F.2d 833, 834 (8th Cir. 1988) (emphasis added).

Moreover, in addressing the motions to dismiss, the Court does not write on a clean slate, but is guided in its decisionmaking by the principles established in the Eighth Circuit opinion of *Polychron,* 841 F.2d 833 (8th Cir. 1988) (addressing issues of customer liability under the Reporting Act), and *United States v. Larson,* 796 F.2d 244 (8th Cir. 1986) (addressing issues of a bank official's liability under the Reporting Act).

In *Larson,* the bank customer made numerous monetary transactions at four different bank branch locations, each slightly less than $10,000, in an attempt to avoid the reporting requirements of 31 U.S.C. § 5313. The government charged the customer with concealing material facts from the government in violation of 18 U.S.C. § 1001; and because his structured transactions caused to banks to fail to file CTRs, the government also charged defendant with aiding and abetting in violation of 18 U.S.C. § 2. The district court held defendant's conduct violated the law and convicted him of concealing material facts and aiding and abetting.

On appeal, the Eighth Circuit reversed, holding that (1) defendant could not be guilty of concealing material facts unless there was a duty to disclose the facts, and (2) the Reporting Act imposed no duty on a customer to disclose his conduct to the banks. The Court also reversed the conviction for aiding and abetting, noting that "if the banks were unaware that [defendant] was structuring his transactions, then they committed no offense by failing to file CTRs." *Larson,* 796 F.2d at 247.

In light of *Larson*'s holding that the Reporting Act imposes no duty on a customer to disclose his conduct to the banks, the Court finds that the allegations against defendant-customers Meyer, Williams, and Miller do not constitute a violation of law. Thus, the portion of the superseding indictment charging defendants Meyer, Williams, and Miller with concealing a material fact in violation of 18 U.S.C. § 1001, will be dismissed.

Nevertheless, to the extent the indictment alleges defendants aided and abetted in the non-filing of CTRs in violation of 18 U.S.C. § 2, the Court finds that a trier of fact could find from the allegations in the superseding indictment that the customer-defendants spoke with two senior vice presidents of Farm & Home, and that therefore the bank was aware of defendants' structuring. Therefore, the [sic] that extent defendants' motions to dismiss will be denied.

In *Polychron,* the indictment alleged than an unindicted customer deposited over $140,000 in a bank account, and instructed the bank president to withdraw the full amount in cash withdrawals of less than $10,000 each until the account was depleted. The customer provided the president with signed, blank withdrawal slips. The president made 15 withdrawals in all, and on two days made two withdrawals, each under $10,000, but together totalling more than $10,000. No CTRs were filed on these transactions.

The indictment charged the bank president with two counts of failing to file CTRs or causing them not to be filed; with concealing material facts from the Department of Treasury with regard to those transactions; and with conspiring to violate the Reporting Act and its regulations. The district court granted defendant's motion to dismiss holing that the bank had no duty to report the transactions because the statute and implementing regulations applied only to individual transfers of currency in excess of $10,000 and did not require the aggregation of individual same-day transaction.

On appeal, the Eighth Circuit reversed, holding that the Reporting Act sufficiently apprised the bank president that when a bank "employee acting within the scope of his employment structures an otherwise reportable transaction into multiple transactions in a single day that do not individually exceed $10,000, the bank, or its officer or employee may be held criminally responsible for failing to file or causing the bank to fail to file a CTR." *Polychron,* 841 F.2d at 837. Accordingly, the appellate court held that the indictment charging a bank president wit intentionally structuring transactions in order to avoid the statutory filing requirements in violation of 18 U.S.C. §§ 2 and 1001, sufficiently alleged a crime against the United States.

The government argues that *Polychron,* stands for the proposition that a bank official is criminally liable if he is "involved in" or "has knowledge of" a customer's structuring of transactions. The Court is not persuaded by the government's argument. The *Polychron* court referred repeatedly to Polychron's "structuring the withdrawal," drew a distinction between a customer structuring a withdrawal and a bank *structuring* a withdrawal, and cited several cases from other circuits involving a bank or bank official's actual assistance in or structuring of a transaction. Moreover, although the 1987 regulations require a financial institution to report multiple currency transactions totalling more than $10,000 during any business day *if it has knowledge that they are by or on behalf of any single person,* the Court finds that such was not required by the regulations in effect prior to 1987.

The superseding indictment in this case does not charge defendant Wilmot with "intentionally structuring transactions in order to avoid the statutory filing requirement," or with conspiring to structure transactions in order to avoid the statutory filing requirements." Defendant Wilmot's conduct, as alleged in the superseding indictment differs significantly from the bank president's alleged complicity in the structuring of the customers

transactions set forth in *Polychron*. The Court will address the Counts in reverse order, dealing with the substantive count first, and the conspiracy counts second.

Count IV, charging defendants with the substantive violation of 18 U.S.C. § 1001 in connection with the St. Louis transactions alleges only that

(1) defendant Wilmot was the senior vice president of the Farm & Home in Dallas, and

(2) that as part of the scheme defendant Wilmot telephones James Besher to inform him that defendant Meyer and other individuals would be contacting him.

The Court finds that even if proved, these allegations do not sufficiently allege a crime against the United States.

Count III charging defendants with conspiring to violate 18 U.S.C. § 1001 by causing the non-filing of CTRs in connection with the St. Louis transactions contains no additional allegations in support of the underlying substantive offense. According, the Court finds Count III does not sufficiently allege a crime against the United States.

Count I, charging defendants with conspiring to violate 18 U.S.C. § 1001 by causing the non-filing of CTRs in both St. Louis, and Dallas, Texas, alleges only that

(1) defendant Wilmot was the senior vice president responsible for all of Farm & Home Savings Association's branches in the Dallas, Texas metropolitan area; and

(2) defendants Wilmot, Meyer, Williams, and special agent Thompson had a conversation in Wilmot's office at the North Dallas, Texas branch of Farm & Home Savings Association, after which defendants

Meyer and Williams purchased the money orders in question; and

(3) James Besher, not a named defendant in the indictment had a telephone conversation with defendant Wilmot.

The Court finds these allegations, even if proved, do not sufficiently allege a substantive crime against the United States.

Accordingly,

IT IS HEREBY ORDERED that the Magistrate's recommendation is overruled in part and sustained in part.

IT IS HEREBY FURTHER ORDERED that the motion to dismiss Counts I, III, and IV and the superseding indictment filed by defendants Meyer, Williams, and Miller is granted as to the charge that they concealed, or conspired to conceal material facts from the government, and denied as to the charge that they aided or abetted, or conspired to aid or abet in the non-filing of CTRs.

IT IS HEREBY FURTHER ORDERED that defendant Wilmot's motion to dismiss Counts I, III, and IV of the superseding indictment for failure to allege any crimes against the United States is granted as to this defendant.

/s/ illegible
UNITED STATES
DISTRICT JUDGE

Dated: 6-27-90

APPENDIX C

UNITED STATES of America

v.

Joseph Vito MASTRONARDO, Jr.,
Appellant No. 87-1525.

UNITED STATES of America

v.

Joseph Vito MASTRONARDO, Sr.,
Appellant No. 87-1655.

UNITED STATES of America

v.

John Vito MASTRONARDO, Appellant
No. 87-1526.

UNITED STATES of America

v.

Herbert L. CANTLEY,
Appellant No. 87-1543.

UNITED STATES of America

v.

John HECTOR,
Appellant No. 87-1561.

Nos. 87-1525, 87-1526, 87-1541,
87-1561 and 87-1644.

United States Court of Appeals,
Third Circuit.

Argued May 2, 1988.
Decided June 13, 1988.

Rehearing Denied in Nos. 87-1525, 87-1526, 87-1561 and 87-1644 July 18, 1988.

Rehearing and Rehearing In Banc in No. 87-1541 Denied July 18, 1988.

Defendants were convicted in the United States District Court for the Eastern District of Pennsylvania, Anthony J. Scirica, J., of gambling offenses, and related offenses, and they appealed. The Court of Appeals, Cowen, Circuit Judge, held that Currency Transaction Reporting Act and attendant regulations, as they existed prior to 1986 amendment to the Act, did not give a reasonable bank customer fair notice that structuring cash transactions to avoid the reporting requirements was criminal, and that type of structuring could not form the basis for any criminal conviction.

Affirmed in part and reversed in part.

Dennis J. Cogan, Abramson, Cogan, Kogan, Freedman & Thall, P.C., Philadelphia, Pa., for appellant Joseph Vito Mastronardo, Jr.

John Rogers Carroll, Thomas Colas Carroll (argued), Carroll & Carroll, Philadelphia, Pa., for appellant Joseph Vito Mastronardo, Sr.

Peter Goldberger, Philadelphia, Pa., for appellant John Vito Mastronardo.

James D. Crawford (argued, Sherry J. Hanley, Schrader, Harrison, Segal & Lewis, Philadelphia, Pa., for appellant Herbert L. Cantley.

Norris E. Gebman, Philadelphia, Pa., for appellant John Hector.

Edward S. G. Dennis, Jr., U.S. Atty., Walter S. Batty, Jr., Asst. U.S. Atty., Chief of Appeals, Glenn B. Bronson (argued), Asst. U.S. Atty., Philadelphia, Pa., for U.S.

Before GIBBONS, Chief Judge, MANSMANN and COWEN, Circuit Judges.

OPINION OF THE COURT

COWEN, Circuit Judge.

Joseph Vito Mastronardo, Jr., Joseph Vito Mastronardo, Sr., John Vito Mastronardo, Herbert Cantley and John Hector each appeal to this court to overturn their convictions for conducting an illegal gambling business in violation of 18 U.S.C. § 1965, using interstate telephone service in aid of an illegal gambling business, in violation of 18 U.S.C. § 1962, participating in a conspiracy to defraud the United States, in violation of 18 U S.C. § 371, and concealing material facts from the United States, in violation of 18 U.S.C. § 1001.[1]

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[1] Not all of the appellants were convicted of each of these crimes. Mastronardo, Jr. was convicted of one count of conspiracy to defraud the United States, one count of conducting an illegal gambling business, eight counts of using an interstate telephone service in aid of a gambling business, and one count of concealing material facts from the United States. Mastronardo, Sr. was convicted of one count of conspiracy to defraud the United States, one count of conducting an illegal gambling business, two counts of using interstate telephone service in aid of a gambling enterprise, and one count of concealing material facts from the United States. John Mastronardo was convicted of one count of conducting an illegal gambling business and one count of using interstate telephone service in aid of a gambling business. Cantley was convicted of two counts of conspiracy to defraud the United States, one count of conducting an illegal gambling business, and three counts of concealing material facts from the United States. John Hector was convicted of one count of conducting an illegal gambling business and two counts of using interstate telephone service in aid of a gambling enterprise.

Because we agree with Mastronardo, Jr., Mastronardo, Jr. and Cantley's argument that their convictions for conspiracy to defraud the United States and concealing material facts from the United States are based, at least in part, on allegations that they "structured" currency transaction so as to induce banks to fail to file Currency Transaction Reports ("CTRs"), and that the statutes and regulations then in force did not give them fair notice that such "structuring" was criminal, we will reverse these convictions. We find the remainder of the appellants' arguments to be without merit and affirming the remaining convictions.

I.

On June 26, 1986, a federal grand jury returned a 63 count indictment against eighth defendants. The indictment named the five appellants—Joseph Vito Mastronardo, Jr., Joseph Vito Mastronardo, Sr., John Vito Mastronardo, Herbert L. Cantley, and John Hector—and three co-defendants not parties to this appeal—Shearson Lehman Brothers, Inc. ("Shearson"), Mario Scinicariello, and Sheldon Shore. Each of the defendants was indicted for crimes arising out of an alleged multi-million dollar bookmaking and money laundering operation.[2]

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[2] Count I of the indictment charged Mastronardo, Jr., Mastronardo, Sr. John Mastronardo, Cantley, Hector, Shearson Lehman and Shore with participating in a conspiracy to defraud the United States in violation of 18 U.S.C. § 371. As charged in the indictment, this conspiracy was one to

> defraud the United States by impeding, impairing, obstructing and defeating the following lawful governmental functions of the Internal Revenue Service of the United States (the "IRS"): (a) the functions of collecting data and reports of currency transactions in excess of $10,000 to be used in criminal, tax and regulatory investigations and proceedings; (b) the function of enforcing the laws and regulations set forth in Chapter 53 of Title 31, United States Code, and Part 103 of Title 31, Code of Federal Regulations, regarding the required reporting of currency transactions in excess of $10,000; and (c) the function of as-

(Footnote 2 continued next page)

All defendants, except Scinicariello, were tried together before a jury. At the close of the government's case, the district

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(Footnote 2 continued)

> certaining, computing assessing and collecting the revenue, specifically, income taxes due and owing the United States from JOSEPH VITO MASTRONARDO, JR., JOSEPH VITO MASTRONARDO, SR., JOHN VITO MASTRONARDO, JOHN HECTOR and SHELDON SHORE, on income derived from the Mastronardo gambling business and elsewhere.

App. at 97.

Count 2 charged that Cantley, Scinicariello and Shearson had conspired to conceal Scinicariello's cash income from the government in an effort to defraud the United States. This conspiracy, as charged in the indictment, sought to

> defraud the United States by impeding, impairing, obstructing and defeating the following lawful governmental functions of the Internal Revenue Serv ice of the United States (the "IRS"): (a) the function of collecting data and reports of currency transactions in excess of $10,000 to be used in criminal, tax and regulatory investigations and proceedings; (b) the function of enforcing the laws and regulations set forth in Chapter 53 of Title 30, United States Code, and Part 103 of Title 31, Code of Federal Regulations, regarding the required reporting of currency transactions in excess of $10,000; and (c) the function of ascertaining, computing, assessing and collecting the revenue, specifically, income taxes due and owing the United States from MARIO SCINICARIELLO.

App. at 132.

Count 3 charged Mastronardo, Jr., Mastronardo, Sr., John Mastronardo, Cantley, Hector and Scinicariello with violation of 18 U.S.C. § 1955 by conducting, financing, managing, supervising, directing and owning a multistate illegal gambling business.

Counts 4 through 24 charged Mastronardo, Jr., Mastronardo, Sr., John Mastronardo and Hector with using interstate telephone service in aid of an illegal gambling business in violation of 18 U.S.C. § 1952. Mastronardo, Jr. was named in Counts 4 to 19, Mastronardo, Sr. in Counts 15 to 19, John Mastronardo in Counts 20 to 23, and Hector in Counts 11 and 24.

(Footnote 2 continued next page)

court entertained defendants' motions for directed verdicts of acquittal, and granted those motions as to all of counts four to six, fifteen to seventeen, and twenty to twenty-two. The district court also granted Mastronardo, Sr.'s motion for directed verdicts on counts twenty-five to thirty-eight, and forty-eight to fifty-four. Finally, the district court granted John Mastronardo's motion for directed verdicts on counts twenty-five to thirty-nine, forty-eight to fifty-five, and sixty-one.

The jury returned the following guilty verdicts on February 25, 1987. Mastronardo, Jr. was convicted of conspiracy to defraud the United States (count one), conducting an illegal gambling business (count three), eight counts of using interstate telephone service in aid of a gambling business (counts eight to thirteen, eighteen, and nineteen), and concealing material facts from the United States (count sixty-one). Mastronardo, Sr. was convicted of conspiracy to defraud the United States (count one), conducting an illegal gambling business (count three), two

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(Footnote 2 continued)

Counts 25 through 60 charged the defendants with willfully causing financial institutions to fail to file CTRs for cash transactions greater than $10,000, in violation of 31 U.S.C. §§ 5313 and 5322, 18 U.S.C. § 2, and 31 C.F.R., Part 103. Specifically, Cantley and Shearson were named in Counts 25 through 60. Mastronardo, Jr., Mastronardo, Sr., John Mastronardo and Hector were named in Counts 25 through 39 and 48 to 55. Scinicariello was named in Counts 40-45 and 56 to 59, and Shore was named in Counts 38 and 55.

Count 61 charged all defendants except Scinicariello with participating in scheme to conceal the existence, source, origin, and transfer of currency by exchanging currency for cashier's and treasurer's checks of less than $10,000, in violation of 18 U.S.C. §§ 1001 and 1002. This scheme allegedly sought to conceal income earned by the Mastronardo gambling business.

Count 62 charged Cantley, Scinicariello and Shearson with participating in a similar scheme to conceal the unreported cash income of Stanley Marvel, III, in violation of 18 U.S.C. §§ 1001 and 1002.

counts of using interstate telephone service in aid of a gambling business (counts eighteen and nineteen), and concealing material facts from the United States (count sixty-one). John Mastronardo was convicted of conducting an illegal gambling business (count twenty-three). Cantley was convicted of two counts of conspiracy to defraud the United States (counts one and two), conducting an illegal gambling business (count three), and three counts of concealing material facts from the United States (counts sixty-one through sixty-three). Hector was convicted of conducting an illegal gambling business (count three), and two counts of using interstate telephone service (counts eleven and twenty-four).

These defendants were acquitted of the remaining charges against them, and defendants Shore and Shearson were acquitted of all charges.[3] Mastronardo, Sr., Mastronardo, Jr., and John Mastronardo, Cantley and Hector appeal their convictions to this Court.

II.

The principal contention raised in this appeal is whether the above named defendants can be held criminally liable for "structuring" currency transactions to avoid having financial institutions report the transactions to the government.[4] As originally

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[3] On July 2, 1987, the district court granted Mastronardo, Sr.'s motion for a new trial on his conviction under count 61, on the ground of improper venue, and denied the defendants' other post-trial motions. This count against Mastronardo, Sr. was subsequently dismissed by the district court on motion of the United States.

[4] Appellants raised a number of additional contentions which they assert provided sufficient justification for overturning their remaining convictions. Specifically, Mastronardo, Jr. asserts that the district court erred in admitting

(Footnote 4 continued on next page)

enacted, the Currency Transaction Reporting Act, 31 U.S.C. § 6311 *et seq.* (1982), authorized the Secretary of the Treasury to require the reporting of currency transactions.[5] Although the statute permitted the Secretary to adopt regulations requiring both "financial institutions"[6] and other "participants in transactions to file CTRs, the Secretary, during the time period relevant

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(Footnote 4 continued)

certain audio tapes into evidence, because, he alleges, the seizure of those tapes was not authorized by the relevant search warrant, and because the use of the tapes as evidence against him violated 18 U.S.C. § 2515. He asserts that the district court also erred when it admitted the tapes without affording him an evidentiary hearing. Mastronardo, Jr. raises the additional argument that the district court erred when it declined to confer immunity upon a proposed defense witness. John Mastronardo additionally asserts that the United States presented insufficient evidence to convict him under count twenty-three, and that the court's jury charge on count three did not adequately explain the requirement that at least five persons conduct a gambling business within a certain time period. Cantley also asserts that the United States did not present sufficient evidence to convict him under count three. The defendants incorporate each other's arguments by reference. We have considered these contentions and find them to be without merit.

[5] Section 5313(a) stated:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under such circumstances the Secretary prescribes by regulation, the institution and any other participant to the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

[6] Title 31 U.S.C. § 5312(a)(2) defined a "financial institution" to include banks, thrifts, brokers, currency exchangers, travel agents, and other such establishments.

to this case, issued regulations which required only finance institutions to file CTRs.[7] Such institutions were required to file CTRs when participating in a transaction involving more than $10,000 in currency. Failure to file a CTR when required by the Secretary's regulations subjected the offending *institution* to civil and criminal penalties. However, no provision of the Currency Transaction Reporting Act made it a crime for an individual to "structure" his transactions so as to keep each transaction under the $10,000 floor, thus inducing a financial institution not to file a CTR in instances where it might be required to file a CTR were the person's transactions aggregated.[8]

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[7] 31 C.F.R. 103.22, as in effect during the relevant time period, stated:

> (a) Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the form shall be furnished.

Although not a published regulation, the CTR form provided to financial institutions (Form 4789) stated on its back:

> Each financial institution must file a form 4789 for each deposit, withdrawal, exchange of currency, or other payment or transfer, by, through, or to that financial institution, which involves a transaction in currency of more than $10,000. Multiple transactions by or for any person which is any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them.

[8] Congress has since acted to clarify the status of "structuring". Amending the Act in 1986, Congress added a provision entitled "Structuring transactions to evade reporting requirements prohibited," which states:

> No person shall for the purpose of evading the reporting requirements of sections 5313(a) with respect to such transaction—

(Footnote 8 continued next page)

The issue presented by this case is whether a person can be held criminally liable for "structuring" transactions during the relevant time period in such a way that a bank or other financial institution would not be aware that the person is making a number of transactions which, if aggregated, involve more than $10,000 in currency.[9] The United States asserts that such criminal liability exists under a number of statutes, and it charged the defendants in this case with violations of each. First, the

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(Footnote 8 continued)

(1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);

(2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

Pub. L. No. 99-570, Title 1, § 1354(a), 100 Stat. 3207-22 (1986) (codified as 31 U.S.C. § 5324).

This provision, however, was not in effect when the defendants in this case acted to structure transactions as as to induce banks to fail to file CTRs.

[9] Some courts addressing similar cases have created a subissue, which requires that the court consider whether the transactions at issue were made during the same day, or at the same bank, or at the same bank branch. Because we hold that any application of criminal punishment to a bank customer under these statutes and regulations violates due process, *see infra*, we find it unnecessary to draw these distinctions.

United States charged the defendants with violating 18 U.S.C. § 2(b) ("§ 2(b)"),[10] which establishes that a person who causes another to commit an offense against the United States is chargeable as a principal. The government alleged that the defendants willfully caused bank officials to fail to file CTRs. The defendants, however, were acquitted of these § 2(b) charges.

The defendants were also charged, and convicted of violating 18 U.S.C. § 1001 ("§ 1001"),[11] which proscribes schemes to conceal, or cause to be concealed a material fact from the United States. Allegedly, the defendants' structuring of transactions in an attempt to induce banks not to file CTRs constituted an illegal deceptive scheme designed to deprive the Treasury Department of the information contained in the CTRs.

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[10] 18 U.S.C. § 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

[11] 18 U.S.C. § 1001 provides:

> Whoever, in any manner within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Finally, the defendants were charged and convicted of violating 18 U.S.C. § 371 ("§ 371"),[12] by participating in two conspiracies to defraud the United States. The government charged that the defendants conspired to conceal income illegally produced by their gambling operation. Inducing banks to fail to file CTRs was referred to by the district court as an "object" of this conspiracy. App. 222-23. The government also individually charged Cantley with conspiring to conceal income earned by Mario Scinicariello. The indictment, in counts one and two, charged that the defendants conspired to defraud the United States by impairing its ability to collect data and reports on currency transactions, to enforce laws requiring the reporting of currency transactions, and to determine and collect income taxes. App. at 97, 112. Thus, while this appeal does not involve a specific conviction for the act of "structuring" transactions, both the § 1001 convictions and the § 371 conspiracy convictions rely upon the purported illegality of "structuring" in order to impose criminal liability upon these defendants.

The issue of whether the United States can impose criminal liability on persons for structuring currency transactions to avoid inducing financial institutions to file CTRs has been addressed by a number of circuit and district courts. The decisions have produced a severe split among the circuits. A number of circuits,

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[12] 18 U.S.C. § 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
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> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

including the First, Seventh, Eight, Ninth and Eleventh, have reversed § 2(b) "willful causing", § 1001 "scheme to conceal" and § 371 conspiracy convictions, generally because they found either (1) that the statutes and regulations discussed above did not appear to proscribe such acts, or (2) that these convictions did not pass constitutional muster because the statutes and regulations failed to give fair warning that the conduct prosecuted was proscribed. *See United States v. Anzalone*, 766 F.2d 676, 680-83 (1st Cir. 1985) (reversing convictions under § 2(b), § 1001 and 31 U.S.C. §§ 5312, 5322 because prosecution violates fair warning clause of fifth amendment); *United States v. Gimbel*, 880 F.2d 621, 624-26 (7th Cir. 1987) (reversing convictions of bank customer under § 1001 via § 2(b) because statutes and regulations impose no duty upon bank to report "structured" transactions, and thus no derivative duty devolves to customer); *United States v. Larson*, 796 F.2d 244, 245-47 (8th Cir. 1986) (reversing convictions under § 2(b) and § 1001 because imposing duty on bank customer under statutes and regulations in force would violate due process); *United States v. Varbel*, 780 F.2d 758, 760-62 (9th Cir. 1986) (reversing convictions under § 2(b), § 1001, and § 371 because application of criminal sanctions against "structuring" customer would violate due process); *United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986) (same); *United States v. Reinis*, 794 F.2d 506 (9th Cir. 1986) (same); *United States v. Densmark*, 779 F.2d 1559 (11th Cir. 1988) (reversing conviction under § 1001 where bank customer had purchased 14 cashiers checks at 14 different banks, because such transactions do not create a duty on the part of banks to file CTRs); *but see United States v. Bank of New England, N.A.*, 821 F.2d 844 (1st Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 328, 98 L.Ed.2d 356 (1987) (distinguishing *Anzalone* from case involving prosecution of bank when customer presented more than $10,000 to same branch of bank during single visit); *United States v. Giancola*, 783 F.2d 1549, 1552-53 (11th Cir.), *cert. denied*, ___ U.S. ___, 147 S.Ct. 669, 93 L.Ed.2d 721 (1986)

(upholding conspiracy convictions where co-conspirators made transactions of more than $10,000 in one day at single branch of bank).

While the First, Seventh, Eighth and Ninth Circuits would overturn convictions like those before this Court, the Eleventh apparently would not overturn a conviction if more than $10,000 is exchanged at a single bank branch in a single day. *See Giancola*, 788 F.2d at 1552-53.

Other Courts, including the Second, Fourth, and Tenth Circuits, have upheld convictions. *See United States v. Heyman*, 794 F.2d 788 (2d Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 585, 98 L.Ed.2d 587 (1986); *United States v. Riocheson*, 875 F.2d 17 (4th Cir. 1987); *United States v. Cook*, 745 F.2d 1311 (10th Cir. 1984), *cert. denied*, 469 U.S. 1220, 105 S.Ct. 1205, 84 L.Ed.2d 347 (1985).[13] These courts have generally looked to the intent of the law and concluded that the statute and regulations do proscribe the conduct prosecuted.

We hold that this statute and regulation did not give a reasonable bank customer fair notice that "structuring" cash transactions to avoid the reporting requirement is criminal. Therefore, we need not reach an analysis of Congressional intent. Although the statute authorizes the Secretary to draft regulations requiring "participants" in transactions to file CTRs, the Secretary did not do so. Rather, the Secretary enacted regulations which, by their explicit language, place a duty to file CTRs only on financial institutions. The regulations do not even intimate that a bank customer might somehow be violating the law if he structures his transactions so as to avoid making a transaction in currency greater than $10,000. While a bank customer might reasonably

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[13] A good, if slightly outdated summary of the development of the law in this area can be found in the opinion of Judge Barker in *United States v. Fisk*, 672 F. Supp. 346, 350-58 (S.D. Ind. 1987).

conclude that doing so would frustrate the intent of Congress, frustrating the intent of Congress is not criminal. An additional factor, noted by the Ninth Circuit, is that "[t]he present ambiguity regarding coverage of the Reporting Act and its regulations has indeed been created by the government itself." *Varbel*, 780 F.2d at 762.

Given the principle that criminal statutes must be strictly construed, *United States v. Enmons*, 410 U.S. 396, 411, 93 S.Ct. 1007, 1015, 36 L.Ed.2d 379 (1979), and the Supreme Court's pronouncement that "a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited," *Kolender v. Lawson*, 451 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983), we hold that imposing criminal liability on customers for "structuring" transactions violates due process.

Therefore we will reverse the convictions under § 1001 and § 371.

III.

For the foregoing reasons, we will reverse Mastronardo, Jr.'s convictions under counts one and sixty-one, Mastronardo, Sr.'s conviction under count one, and Cantley's convictions under counts one, two, and sixty-one through sixty-three. We will affirm the remaining convictions.